Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DENNIS L. MARTIN,
Petitioner,

v.

BARNESVILLE EXEMPTED VILLAGE
SCHOOL DISTRICT BOARD OF EDUCATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether prima facie proof of disability discrimination, coupled with indirect evidence sufficient to support a finding that the employer has not offered its true reason for an adverse employment action, is sufficient to deny a motion for summary judgment.

2. Whether a plaintiff, claiming coverage under the Americans with Disabilities Act through the "regarded as" provision, must prove by subjective evidence that the disability which the employer regarded the employee as having was perceived by the employer as a disability which substantially limited the major life activities of the employee.

3. Whether a misconduct exception to the disability of alcoholism is appropriately instituted when the misconduct occurred over three years before the adverse employment action and after the employee, while objecting to the charge of alcoholism, successfully completed a rehabilitation program.

PARTIES TO THE PROCEEDINGS

Petitioner

Dennis L. Martin. Petitioner is an individual and has no corporate affiliations.

Respondent

Barnesville Exempted Village School District Board of Education.

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The Order of the Sixth Circuit denying Plaintiff's Petition for Rehearing filed June 12, 2000 is reproduced in App. C at 21a.

The Order and Opinion of the United States District Court for the Southern District of Ohio, Eastern Division, filed on February 2, 1999, is reported as *Martin v. Barnesville Exempted Village School Distr. Bd. Of Educ.*, 35 F. Supp. 2d 1038 (S.D. Ohio 1999) and is reproduced in App. B at 9a.

JURISDICTIONAL STATEMENT

The Opinion of the United States Court of Appeals for the Sixth Circuit was entered April 21, 2000 (App. A at 1a). A timely petition for rehearing was denied June 12, 2000 (App. C at 21a), and this petition is timely filed. Sup. Ct. R. 13. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Equal Opportunity for Individuals with Disabilities
42 U.S.C.§ 12102(2)

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such impairment; and

(C) being regarded as having such an impairment

Equal Opportunity for Individuals with Disabilities
42 U.S.C.§ 12112(a)

(a) General Rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Equal Opportunity for Individuals with Disabilities
42 U.S.C.§ 12114(b)

(a) Qualified individual with a disability

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs,

(b) Rule of construction

Nothing in Subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use

(2) a record of such an impairment; or

(3) is erroneously regarded as engaging in such use, but is not engaged in such use

* * *

Equal Opportunity for Individuals with Disabilities
42 U.S.C.§ 12114(c)

(c) authority of a covered entity

A covered entity—

* * *

(4) may hold that an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee;

* * *

STATEMENT OF THE CASE

This case is unique as it involves the Respondent's denial of equal employment opportunities to the Petitioner between 1994 and 1997, because of the Respondent's and the small Ohio town of Barnesville's false perception and fear that the Petitioner is an alcoholic due to a one time incident of drinking a beer while working as a custodian in 1991, completing an employer mandated alcohol rehabilitation program as part of a last chance agreement, and for Appellant's admission that he continues to engage in the casual use of alcohol. The Petitioner is in fact not an alcoholic, and has never been an alcoholic, and has never had a "drinking problem" as alleged by Respondent.

Petitioner was hired by Respondent on April 17, 1984 as a school bus driver. Petitioner, without incident, performed as a bus driver for seven years. Working without incident for seven years, and as a member of an employee union, Petitioner submitted a bid for an evening custodian position with work hours from 3:30 p.m. to 12:00 a.m.

With stores closing early in the small town of Barnesville, Petitioner purchased a six pack of Busch beer, for consumption at home, while in route to work on November 16, 1991. Using admitted poor judgment, Petitioner began consuming a beer on the job while performing his solitary evening shift. Petitioner's conduct was observed by the School Board President, Mr. Miller, who was in the building after normal hours. Mr. Miller, the School Board President, informed the School Superintendent, Mr. Wilson, of the Petitioner's conduct as observed. As a result, Petitioner was called into the Superintendent's office where Petitioner offered his resignation. The School Superintendent, Mr. Wilson, did not accept Petitioner's

resignation, but, instead put Petitioner on paid suspension pending investigation and suggested he contact his union representative.

After the investigation revealed the above facts, many of the School Board members wanted the Petitioner immediately fired. However, instead of firing Petitioner, the Petitioner was given the choice of termination or participation in a last chance agreement. Even though Petitioner did not believe that he was an alcoholic, Petitioner chose the last chance agreement which required, among other things: Petitioner admit he had a "drinking problem"; Petitioner, upon request, submit to alcohol and/or drug testing; and, that Petitioner successfully complete a certified alcohol rehabilitation program. Petitioner successfully completed each term of the last chance agreement and had no employment problems since the November 16, 1991 incident.

Approximately three and a half years later, in late 1994/1995, after Petitioner had complied with all the terms of the agreement, including rehabilitation, Petitioner submitted bids for a posted bus driver position. However, even though Petitioner maintained the highest seniority and was entitled to the job pursuant to union contract, Petitioner was passed over twice for the bus driver position. Petitioner again bid on a bus driver position in 1997, and was again refused the position even though Petitioner maintained the highest seniority. Petitioner filed a grievance with the union and was subsequently awarded the position by an arbitrator. Respondents then took the case to an Ohio court of general jurisdiction which found for the Respondents to this action and overruled the arbitrator's award for Petitioner. On appeal to the Seventh District Court of Appeals of Ohio, the arbitrator's decision was reinstated. Respondents then appealed to the Ohio Supreme Court arguing against the

arbitrator's award alleging that the Petitioner was a safety hazard because the Petitioner had a "drinking problem" and continues to drink. The Ohio Supreme Court refused jurisdiction and Petitioner was given the job as a school bus driver in 1997.

Petitioner brought this action pursuant to Americans with Disabilities Act, 42 U.S.C. § 12112 in the United States District Court for the Southern District of Ohio seeking protection under the erroneously "regarded as" definition of disability and requesting back pay, lost wages, or compensatory damages. The District Court ruled that Petitioner did not prove a prima facie case of disability discrimination because, "Plaintiff did not maintain . . . that the LCA establishes that he is *substantially limited in a major life activity*, or that Defendant regarded him as having an impairment *that substantially limits a major life activity*." (Emphasis added)

On appeal to the United States Appeals Court for the Sixth Circuit, the Sixth Circuit upheld the lower court's ruling in favor of summary judgment, however, the Appeals Court did so by erroneously interpreting the employer's conflicting stated motivations for its conduct in the employer's favor and making an implied distinction between an adverse employment action based on the discriminatory motivation that Petitioner was erroneously regarded as an alcoholic and a suggested "nondiscriminatory" motivation that Petitioner may be too great a risk because he *may* be an alcoholic even if the perception is erroneous. In support of this implied distinction, the Sixth Circuit stated that: "[I]f an accident should occur and students were injured or killed, the school board would be subject to large compensatory and punitive damages and open itself to the moral condemnation of the community." See App. A at 8a.

In addition, the Circuit Court never ruled on the Petitioner's establishment of a prima facie case assuming that the Petitioner established a prima facie case.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

The questions presented in this case involve three different areas of the law regarding discrimination: (1) the summary judgment requirements for a prima facie case of "regarded as" disability discrimination, (2) whether "alcoholism" by definition should be considered a per se impairment; and (3) the scope of the misconduct exception within the framework of disability discrimination. This Court should grant Certiorari because this Court has addressed these questions in *dicta* but has never handed down any holdings in these regards. Furthermore, if not addressed, the Sixth Circuit's reported opinion in this case would be in conflict with opinions in other circuits, specifically the Eighth Circuit's opinion in *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir. 1997). Finally, this Court should answer these questions because the error of the two lower courts, if not addressed, would produce a framework within the area of Disability Discrimination that unfairly favors defendants by providing defendants in every discrimination case involving alcohol an unrebuttable legitimate nondiscriminatory reason for the employer's adverse employment action.

ARGUMENT 1

THE COURT OF APPEALS FAILED TO FOLLOW THIS COURT'S HOLDING IN *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*, ___ U.S. ___ (2000) BY AFFIRMING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT WHEN THE PETITIONER PROVIDED SUFFICIENT EVIDENCE FROM WHICH A REASONABLE JURY COULD FIND FOR THE PETITIONER.

This case involves discrimination under the Americans with Disabilities Act. This Act makes it unlawful for a "covered entity" to, "discriminate against a qualified individual with a disability because of the disability of such individual in regard to job . . . advancement." 42 U.S.C. § 12112. This Act further provides that, the term 'covered entity' means an employer. . ." 42 U.S.C. § 12111. The American's with Disabilities Act also states that, "'disability' means, with respect to an individual . . .:

> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such impairment; and
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102.

In recognition of the difficult task in proving a case discrimination with direct evidence, this Court has established a framework in discrimination cases which gives employees

the opportunity to prove their cases through circumstantial evidence. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In a case under the *McDonnell Douglas* framework, the employee, "must carry the initial burden . . . of establishing a prima facie case . . ." *Id.* at 802. In order to establish a prima facie case of disability discrimination, the United States Appeals Courts for the Sixth, Eighth, Tenth, and Eleventh Circuits require that the employee prove:

1) The employee was disabled,

2) The employee was qualified for the position with or without a reasonable accommodation; and

3) The employee was denied a reasonable accommodation for the disability or was subject to an adverse employment decision because of the disability.

Rousch v. Weastec, Inc., 96 F.3d 840, 843 (6th Cir. 1996); *Miners v. Cargill Communications, Inc.*, 113 F.3d 820, 823 (8th Cir. 1997); *White v. York Int'l Corp.*, 45 F.3d 357, 360-361 (10th Cir. 1995); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068 (11th Cir. 1996).

Once the employee has established a prima facie case of discrimination, the burden shifts to the employer who must then rebut the presumption of discrimination with a legitimate non-discriminatory reason for the adverse employment decision. *McDonnell Douglas*, at 802. Once the employer has offered a reason for the adverse employment action, then the burden shifts to the employee who must show that the

offered reasons, "were in fact a cover up for a . . . discriminatory decision." *McDonnell Douglas*, at 805.

A. This Court has recently restated that the McDonnell Douglas framework is an, "allocation of the burden of production and an order for the presentation proof in...discriminatory-treatment cases." *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___ (2000); citing, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). In *Reeves* this Court made clear that, "[t]his burden is one of production, not persuasion; 'it can involve no credibility assessment.'" *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___ (2000).

The United States Appeals Court for the Sixth Circuit found that the employer's offered legitimate non-discriminatory reason of misconduct was sufficient to uphold summary judgment for the employer. However, the plaintiff-employee illustrated that an issue of fact existed by producing evidence that the defendant-employer failed to make this defense until the most recent adjudication. Instead, in earlier adjudication, employer-defendant used the defense that the plaintiff-employee was an alcoholic and that defendant-employer should not be required to make such an accommodation to an alcoholic. Specifically, in the Respondent's brief, the Respondent argued that the Petitioner was denied positions between 1994 and 1997 not because he was erroneously regarded as an alcoholic but because of his 1991 misconduct regarding his last chance agreement. However, the Petitioner clearly submitted conflicting evidence to the Respondent's proffered reason that Respondent consistently and publicly said that it perceived the Petitioner to be a person with an "alcohol problem" from 1994 to 1997. In fact, the Respondent informed the Ohio courts over a three

year period, that the *only* problem the Appellee School Board had with Appellant Martin, was his "drinking problem":

> **1995**
> On December 17, 1991, Martin and the Union President admitted in writing, . . . that Martin ". . . has a problem with consumption of alcohol; he has a drinking problem."
>
> Despite Martin completing an alcohol rehabilitation program, Martin admitted on cross-examination that to this date, he continues to drink; he also told Superintendent that he "likes his beer."
>
> Despite the fact that one does not cure a "drinking problem" with drinking; despite the fact that Martin continues to drink after completing an alcohol rehabilitation program; despite the Board's obligation to provide a safe workplace; and despite the Board's obligation to the children and the public, the Arbitrator nevertheless ordered Martin employed as a bus driver and mechanic thereby clearly exceeding his authority.

R. 14. Response to Motion for summary judgment, Appendix, Motion to Vacate Arbitrator's Award, August 28, 1995, Apx. pg. ____. (emphasis added).

> **1996**
> Dennis Martin, in the subject written December 17, 1991, agreement, admitted (as also admitted by President Toohey [union president]) that Martin ". . . has a problem

with consumption of alcohol; he has a "drinking problem." Martin even admits now that he still "likes his beer" (T. 29); he still drinks in 1995 (T. 36); he successfully completed an alcohol program, but when asked if he still drinks today, he candidly states "Yes." He admitted to the Superintendent he drinks his beer (T. 48), and that he was still drinking (T. 49). Clearly, one does not resolve a "drinking problem" by "drinking."

* * *

The Superintendent has a mandatory obligation to act regarding this "safety" issue (T. 51), and prevent an admitted current "drinker" who has an admitted "problem," from being placed in two of the most safety-sensitive jobs for the students, the public and the other employees.

See R. 14, Appendices to Plaintiff's Memorandum Contra to Defendant's Motion for Summary Judgment, Tab 6, Appellee's Brief of Appellee at 5-6., Apx. pg. ____ (paragraph numbers omitted) (emphasis added).

1997

Dennis Martin in the subject written December 17, 1991, agreement admitted . . . that Martin ". . . has a problem with consumption of alcohol; he has a ''drinking problem'". . .

* * *

To make certain the Court understands that *the Board has no other "problem" with Mr. Martin* . . .

* * *

> Any doubt as to insuring the safety of children riding on public school buses versus permitting an individual, with an admitted (in writing) drinking problem, who continues to drink, whether or not entitled pursuant to seniority in a collective bargaining agreement to be a bus driver or mechanic must be resolved in favor of insuring the safety of children."

See R. 14, Appendices to Petitioner's Memorandum Contra to Respondent's Motion for Summary Judgment, Tab 8, Respondent's Memorandum In Support of Jurisdiction to the Ohio Supreme Court at 4-6, November 1, 1997, Apx. pg.___ In *Reeves,* this Court stated that in considering a motion for summary judgment, "if there is conflicting testimony, the court generally must disregard the testimony favoring the employer." *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___ (2000).

In the alternative, if the facts do not suffice to illustrate that an issue of material fact remained for the trier of fact, the authority relied on by the lower courts contradicts the authority of this Court. Once again, in *Reeves* this Court made clear that, "[t]his burden is one of production, not persuasion; 'it can involve no credibility assessment.'" *Reeves v. Sanderson Plumbing Products, Inc.*, U.S. ___ (2000). However, the District Court erred by relying on, and the Sixth Circuit erred by stating the standard of summary judgment in *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 339-340 (6th Cir. 1993). The District Court citing from the Sixth Circuit opinion noted that in order to withstand summary judgment, "The nonmoving party must then present '*significant* probative evidence'. . ." App. ____, citing *Moore*, 8 F.3d at 340, emphasis added. The term "significant" in this context requires the decision-maker to

determine the persuasive value of the evidence before allowing a jury to determine the persuasive value. Furthermore, the Sixth Circuit also stated that in reviewing a motion for summary judgment, "a district court should . . . determine whether the evidence presents a *sufficient* disagreement to require submission to a jury . . ." *Moore*, 8 F.3d at 340. The Sixth Circuit, in direct contradiction to this Court's holding in *Reeves*, has established a standard for summary judgment which requires the court to determine the persuasive value of evidence before allowing a case to be heard by a jury.

B. A presentation of a prima facie case of discrimination by an employee, "creates a presumption that the employer unlawfully discriminated against the employee . . ." *Texas Department of Community Affairs v. Burdin*, 450 U.S. 248, 254 (1981). Furthermore, an unrebutted prima facie case requires, "judgment for the plaintiff because no issue of fact remains in the case." *Id.* Therefore, it follows that if a prima facie case meets the production requirements for judgment in favor of a plaintiff, then production of evidence sufficient for a prima facie case also meets the requirements for a jury to hear the case.

ARGUMENT 2.

THE CIRCUIT COURT ERRED IN AFFIRMING SUMMARY JUDGMENT THEREBY PRODUCING AN ABSURD RESULT BECAUSE THE DISTRICT COURT'S EVIDENTIARY REQUIREMENTS OF A PRIMA FACIE CASE OF "REGARDED AS" DISABILITY DISCRIMINATION CREATED A HIGHER EVIDENTIARY STANDARD FOR "REGARDED AS" DISABILITY DISCRIMINATION CASES WHICH IS AGAINST THE LEGISLATURES INTENT.

A. ALCOHOLISM SHOULD BE CONSIDERED A *PER SE* DISABILITY UNDER THE "REGARDED AS" AND "RECORD OF" DEFINITIONS OF DISABILITY BECAUSE ALCOHOLISM IS CONSIDERED A *PER SE* IMPAIRMENT UNDER THE TERMS OF THE REHABILITATION ACT OF 1977.

The Sixth Circuit erred by not reversing the District Court's decision in this case holding that there was no evidence that either the Petitioner's "record of" impairment of alcoholism or the impairment of alcoholism that he is "regarded as" having is one that substantially limits a major life function. *Martin v. Barnesville Exempted Village School Distr. Bd. Of Educ.*, 35 F. Supp. 2d 1038 (S.D. Ohio 1999), at 18a. The district court states:

> The Plaintiff did not allege in his complaint, nor has he argued or demonstrated in response to Defendant's Motion, that the LCA establishes that he is *substantially limited in a major life activity*, or that Defendant regarded

> him as having an impairment *that substantially limits a major life activity*. In fact, Plaintiff has not attempted to prove that the disability he is alleged to have had substantially limits any major life activity.

Id.

In other words, the District Court held that for Petitioner to meet a prime facie burden of discrimination, the Petitioner not only had to produce evidence that the Respondent regarded the Petitioner as an alcoholic, but in addition regarded the Petitioner's nonexistent alcoholism as "substantially limiting a major life function." This reasoning unrefuted by the Sixth Circuit, has created a burden of impossibility as evidence establishing that Respondent regarded the Petitioner as an alcoholic alone is all that is required under the ADA because "alcoholism by definition is a substantially limiting impairment."

The ADA defines the term disability as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (1994). An actual (as opposed to perceived) impairment is "substantially limiting" if it results in an inability to perform, or a severe restriction on the ability to perform as compared to the average person in the general population, *see* 29 C.F.R. § 1630.2(j)(2) (1996), and the term

"major life activities" includes functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. *Id.* § 1630.2(i).

The applicable regulations provide three ways in which a plaintiff can illustrate that an employer regarded the plaintiff as disabled: (1) the individual may have an impairment which is not substantially limiting but is perceived by the employer as a substantially limiting impairment; (2) the individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or **(3) the individual may have no impairments at all but is regarded by the employer as having a substantially limiting impairment**. *Id.* § 1630.2(1). The Petitioner falls under the protection of the ADA by this last but rare category. In other words, the main question is: **If the Petitioner has no impairments at all but is regarded by the employer as having alcoholism, is he protected by the ADA? The answer is: "Yes."**

"Alcoholism" is a colloquial and not a medical term. The American Psychiatric Association classifies alcoholism as an alcohol use disorder of either Alcohol Dependence or Alcohol Abuse. Diagnostic and Statistical Manual of Mental Disorders, Fourth Addition ("DSM-IV"), American Psychiatric Association, Washington, D.C., 1994, at 194-196. A general theme of an alcoholic is that one engages in uncontrollable drinking until one's consciousness is retarded. Reduced or lack of consciousness obviously affects all major life functions. A common criteria for a person with the substantially limiting impairment of alcohol dependence or alcohol abuse is that the person with the disability "may use alcohol in physically hazardous circumstances (*e.g., driving an automobile or operating machinery while drunk*)," and may continue to consume alcohol despite the knowledge that

continued consumption poses significant problems for them. *Id.* at 195-96.

For purposes of the Americans with Disabilities Act, alcoholism should be considered a *per se* "physical or mental impairment" within the definition of disability. As this Court has noted, Congress has adopted a construction of the Americans with Disabilities Act which provides at least as much protection as that provided under the Rehabilitation Act at 29 U.S.C. § 701 *et seq.* *Bragdon v. Abbott,* 524 U.S. 624, 631-632 (1998). The Rehabilitation Act grants protection to individuals by listing alcoholism as an impairment which is covered under the definition of "physical or mental impairment." Alcoholism therefor deserves *per se* inclusion within the definition of "physical or mental impairment" as defined by the Americans with Disabilities Act because Congress granted *per se* inclusion within the Rehabilitation Act and Congress directed that when construing terms within the Americans with Disabilities Act, those terms be construed to confer the same or more protection.

The terms of the Rehabilitation Act and its pertinent regulations grant *per se* inclusion of alcoholism within the definition of impairment under the Rehabilitation Act. The Rehabilitation Act, under 29 U.S.C. § 705(9)(B), provides in part that the term disability means, "a physical or mental impairment that substantially limits one or more major life activities". 29 U.S.C. § 705 (2000). Furthermore, the pertinent regulations define "a physical or mental impairment" as including "such diseases and conditions as . . . alcoholism." 28 C.F.R. § 41.31(b)(1)(ii) (1999). Therefore, alcoholism enjoys *per se* inclusion within the Rehabilitation Act.

As this Court noted in *Bragdon*, Congress has directed that, when construing terms of the Americans with Disability Act, the construction of those terms should grant, at the least, the same amount of protection which the same terms granted under the Rehabilitation Act. The ADA's definition of "disability" is drawn directly from the definition of "disability" within the Rehabilitation Act, thereby creating a presumption that the terms should be construed similarly. Congress not only suggested that the definition of "disability" be construed the same as the term was construed within the Rehabilitation Act, Congress adopted a provision within the Americans with Disabilities Act which stated that, "[N]othing in this chapter shall be construed to apply a lesser standard than the standards applied under Title V of the rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. §12201(a). Therefore, under the court's analysis, alcoholism should receive *per se* inclusion under the definition of "physical or mental" impairment as defined in the Americans with Disabilities Act.

B. ALCOHOLISM SHOULD BE CONSIDERED A *PER SE* DISABILITY BECAUSE THE AGENCY REGULATIONS CONCERNING THE REHABILITATION ACT WHICH DEFINE HOW TO PROVE A "REGARDED AS" DISABILITY DISCRIMINATION CASE EXCLUDE THE REQUIREMENT THAT THE DISABILITY BE ONE THAT SUBSTANTIALLY LIMITS A MAJOR LIFE ACTIVITY.

As stated by this Court in *Bragdon*, the Americans with Disabilities Act shall be construed to grant at the least, the same protection which is granted through the Rehabilitation Act. *Bragdon*, 524 U.S. at 631-632.

However, the EEOC regulation and the Justice Department regulation which both define "regarded as" discrimination differ in how they define the term. Because Congress, within a statutory provision, directed that the Americans with Disabilities Act be construed to grant at least as much protection as the Rehabilitation Act conferred, and, because the contradictory text is within agency regulations, this Court should follow the Congressional intent and grant, at the least, the same protection to an individual which was granted under the Rehabilitation Act.

The Justice Department and the EEOC both have the duty to implement and enforce the Rehabilitation Act and the Americans with Disabilities Act, respectively. The Justice Department has defined "regarded as having an impairment" to mean, "(iii) has none of the impairments as defined in paragraph (b)(1) of this section but is treated by a recipient as having such an impairment." 28 C.F.R. § 41.31(b)(4)(iii) (1999). However, the definition given by the EEOC differs. The EEOC defines "regarded as having an impairment" to mean, "has none of the impairments as defined in h(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment." 29 C.F.R. 1630.2(l)(3) (1999).

The regulations promulgated by the EEOC concerning the Americans with Disabilities Act specifically state that "regarded as" disability discrimination means, "being treated by a covered entity as having a *substantially limiting impairment*." 29 C.F.R. 1630.2(l)(3) (1999). However, the regulations promulgated by the Justice Department do not use the words "substantially limiting impairment." This evidence seems more persuasive when taken in context. The Americans with Disabilities Act was written thirteen years after the Rehabilitation Act. The Americans with Disabilities

Act was molded around the Rehabilitation Act to such an extent that Congress determined it appropriate to use the same definition almost verbatim. However, while Congress used the same definition for the term disability, and the EEOC had regulations on hand from the Justice Department, the EEOC decided that it would be appropriate to use different terms. The decision to use the specific terms "substantially limiting impairment" also implies that the EEOC believed that the Justice Department regulations did not require that a covered entity regard an individual as having an impairment which was substantially limiting. This evidence, taken in context, illustrates that the EEOC, by using different terms, intended a different effect than found in the parallel regulations of the Justice Department.

This Court should apply the Justice Department regulation defining "regarded as" disability discrimination because by not using the terms "substantially limiting impairment," the Justice Department did not require that the impairment be "substantially limiting" and therefore, the Justice Department regulations provided more protection than the parallel EEOC regulation. In light of the greater protection provided by the Justice Department regulations and in light of the statutory provision directing that the Americans with Disabilities Act be given, at the least, the same amount of protection provided by the Rehabilitation Act , this Court should apply the regulation which provides the greater protection, the Justice Department regulation defining "regarded as" disability discrimination.

C. THE TERM "REGARDED AS" SHOULD BE CONSTRUED TO ALLOW ALCOHOLISM AS A *PER SE* DISABILITY BECAUSE IF CONSTRUED OTHERWISE THE EVIDENTIARY BURDEN FOR PLAINTIFFS INCLUDES A GREATER LEVEL OF THE DEFENDANT'S CONSCIOUSNESS WHICH WAS NOT THE INTENT OF CONGRESS.

Other Circuits have suggested that alcoholism and alcohol addiction is by definition a disability under the ADA. *Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102, 1105 (Fed. Cir. 1996); *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 823 n. 5 (8th Cir. 1997); *Buckley v. Consolidated Edison Co. of New York* 127 F.3d 270, 273 (2nd Cir. 1997).

In the district court's Order and Opinion granting the Appellee's motion for summary judgment, the court based its decision on the proposition that there is no evidence that either the Appellant's "record of" impairment or the impairment that he is "regarded as" having is one that substantially limits a major life function. *Martin v. Barnesville Exempted Village School Distr. Bd. Of Educ.*, 35 F. Supp. 2d 1038 (S.D. Ohio 1999) at 18a-20a. The district court's holding supported by the Sixth Circuit is legally in error. To hold otherwise is to contend that a Petitioner must prove under the "regarded as" definition of the ADA that an employer's "false perception" actually substantially limits a *real* major life activity of the Appellant. This would set for employees seeking the "regarded as" protection under the ADA, the impossible task of proving a negative. That is, if the Petitioner does not have a substantial limitation at all, how is it possible to prove that it actually limits a major life

activity? In other words, no evidence can exist showing an employee is substantially limited in a major life activity, if the employee never had an impairment in the first place. Regardless of this circular proof impossibly, such a requirement is not legally required by the ADA or its predecessor, the Rehabilitation Act of 1973. In conflict with the Sixth's Circuit decision in this case, the Seventh Circuit succinctly addressed this legal issue in *Johnson v. American Chamber of Commerce Publisher, Inc.*, 108 F. 3d 818, 819 (7th Cir. 1997). In *Johnson*, the plaintiff alleged that he was denied a telemarketing position because his employer perceived the fact of his 18 missing teeth to be a disability under the ADA:

> Congress could have written the statute so that the presence of some kind of objectively-ascertainable condition serves as a filter. An objective threshold might help the courts to discard implausible claims without the need for costly discovery. Yet no benefit comes free of cost, and a screening device of this kind is not in the package of rights and obligations Congress enacted. If for no reason whatsoever an employer regards a person as disabled – if, for example, because of a blunder in reading medical records it imputes to him a heart condition he has never had – and takes adverse action, it has violated the statute unless some other portion of the law affords it a defense. The statute forbids "discrimination against '[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all.'" *School Board of Nassau County v. Arline,* 480 U.S. 273, 279,

> 94 L. Ed. 2d 307, 107 S. Ct. 1123 (1987), quoting from *Southeastern Community College v. Davis*, 442 U.S. 397, 405-06 n.6, 60 L. Ed. 2d 980, 99 S. Ct. 2361 (1979). **Other courts of appeals have said or held that the plaintiff need not establish any actual impairment to found a claim on § 1202(2)(C).** *E.g.*, *Harris v. H&W Contracting Co.*, 102 F.3d 516, 523 (11th Cir. 1996); *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1443 (10th Cir. 1996); *Bridges v. Bossier*, 92 F.3d 329, 332 (5th Cir. 1996); *Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996). *Katz* reversed a decision similar to the district court's treatment of Johnson's complaint. We do likewise; unlike Johnson, the Americans with Disabilities Act has teeth.

Id. at 819. (emphasis added).

Accordingly, in a perceived disability case, the Appellant does not have to prove he actually has an impairment at all, substantially limiting or otherwise.

ARGUMENT 3.

THE LOWER COURT ERRED BY SUSTAINING SUMMARY JUDGMENT UPON THE GROUNDS OF MISCONDUCT, BECAUSE, AS APPLIED, THE MISCONDUCT EXCEPTION TO DISABILITY DISCRIMINATION WITHOUT A TIME LIMITATION WOULD GIVE AN EMPLOYER IN A LIKE SITUATION AN UNREBUTTABLE NON-DISCRIMINATORY REASON FOR THE EMPLOYER'S ADVERSE EMPLOYMENT ACTION.

In applying a misconduct exception under the Americans with Disabilities Act, the United States Court of Appeals for the Sixth Circuit granted defendant-employers an unrebuttable non-discriminatory reason for the employer's adverse employment action. Here, the Sixth Circuit allowed an employer to rebut a prima facie showing with misconduct of the Petitioner which occurred three years prior to the first adverse employment action. While this exception seems in general to fit the intent of Congress, as applied to this case, the misconduct exception is against the intent of Congress if it is applied without limitation. The misconduct exception is against the intent of Congress, as applied in this case, because the misconduct lacks a causal connection with the adverse employment decision, the court should have allowed the question to go to the jury. Therefore, there was a question of fact concerning whether or not the plaintiff-employee's misconduct or the defendant-employer's misperception of the plaintiff as disabled was the real reason for the adverse employment action three years after the misconduct.

A. AS APPLIED, THE MISCONDUCT EXCEPTION IS AGAINST THE INTENT OF CONGRESS BECAUSE CONGRESS SUPPLIED A SIMILAR THE MISCONDUCT EXCEPTION IN 42 U.S.C. § 12114(A) CONCERNING DRUG USES, CONGRESS FURTHER LIMITED THE USE OF SUCH EXCEPTION CONCERNING DRUG USES, WHILE THE SIXTH CIRCUIT HAS NOT LIMITED THE SIMILAR JUDGE MADE RULE AS TO ALCOHOLICS.

The Sixth Circuit applied a misconduct exception which runs counter to Congressional intent within the area of

on the job alcohol misconduct. Congress, within the American's with Disabilities Act, has set out a clear policy concerning on the job alcohol and drug misconduct. However, while Congress noted that on the job misconduct of such a nature should not be included within the definition of disability, Congress did formulate a policy which does not support the continued and lasting use of this misconduct as a non-discriminatory reason for any later adverse employment action on the part of the employer.

The Congressional policy stating that drug or alcohol misconduct should not be used continually as support for adverse employment actions by the employer is found within 42 U.S.C. § 12114. This section of the Americans with Disabilities Act restricts the definition of a disabled person to exclude those who are "currently engaging in the illegal use of drugs. . ." 42 U.S.C. § 12114(a). In writing this provision of the Americans with Disabilities Act, Congress, in essence, granted every employer a unrebuttable non-discriminatory reason for an adverse employment action against a drug user. However, realizing the broad power within such a grant of authority, and desiring to protect those who rehabilitate themselves and end their past drug practices, Congress restricts the use of such exclusion when individuals, "[have] successfully completed a supervised drug rehabilitation program and [are] no longer engaging in the illegal use of drugs." 42 U.S.C. § 12114(b)(1).

Congress did not exclude alcoholics who use a "legal drug" from the definition of disability as it did drug users, however, the Sixth Circuit's misconduct exception, as applied in this case, practically has the same effect. In the case of alcohol misconduct, as in the case of drug use at work, adverse employment actions are permitted. However, in the case of drug abuse they are permitted only to the extent that

the employee has not rehabilitated himself. Under the Sixth Circuit's stated misconduct exception, even after an alcoholic has rehabilitated himself, an employer can still take an adverse employment action against him. In this case, even after the employer required the rehabilitation and had effected a last chance agreement which had earlier expired, the employer was still permitted three years later to base an adverse employment action on alleged alcohol misconduct. This directly contradicts the policy which Congress effected concerning drug use in the workplace.

B. AS APPLIED, THE MISCONDUCT EXCEPTION IS COUNTER TO CURRENT SUMMARY JUDGMENT STANDARDS BECAUSE THE EVIDENCE OF MISCONDUCT COUPLED WITH PLAINTIFF'S EVIDENCE ONLY PRESENTS A QUESTION OF FACT APPROPRIATE FOR A JURY.

This Court has recently restated that the *McDonnell Douglas* framework is an, "allocation of the burden of production and an order for the presentation proof in . . . discriminatory-treatment cases." *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___ (2000); *citing*, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). In *Reeves*, this Court made clear that, "[t]his burden is one of production, not persuasion; 'it can involve no credibility assessment.'" *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___ (2000). In this case, the Petitioner presented sufficient evidence which presented a question of fact when compared to Respondent's stated non-discriminatory reason.

Respondent stated that it did not give Petitioner the job because employer did not want to place a person guilty of

drinking on the job in the driver's seat of a bus hauling children. In contradiction to that evidence, Petitioner presented evidence which illustrated that in earlier litigation defendant stated as a defense that Petitioner had a "drinking problem." So, instead of relying on conduct in earlier litigation, Respondents relied on their perception of Petitioner's status as an alcoholic which is unquestionably protected by the Americans with Disabilities Act. Furthermore, Petitioner illustrated that the misconduct occurred three years before the adverse employment. Instead of presenting proof of an unrebutted non-discriminatory reason for the adverse action, the evidence presented by the Petitioner illustrated that a question of fact existed for the determination of a jury.

CONCLUSION

Petitioner submits that a writ of certiorari should therefore be issued to review the decision of the United States Court of Appeals for the Sixth Circuit as its decision is inconsistent with this Court holding in *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___ (2000), and applies a prima facie frame work for the "regarded as" definition of disability protection under the ADA which is in conflict with the other circuits and establishes a seriously flawed methodology which will increase the confusion currently existing in this courts of this land.

Respectfully submitted

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed April 21, 2000]

No. 99-3263

DENNIS L. MARTIN,
Plaintiff-Appellant,

v.

BARNESVILLE EXEMPTED VILLAGE SCHOOL DISTRICT BOARD OF EDUCATION,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Ohio at Columbus. No. 97-00992 Algenon L. Marbley, District Judge.

Before: MERRITT, DAUGHTREY, and MAGILL,* Circuit Judges.

* The Honorable Frank J. Magill, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

OPINION

MERRITT, Circuit Judge. Plaintiff Dennis L. Martin appeals the district court's order granting summary judgment in favor of defendant, Barnesville Exempted Village School District Board of Education. On appeal, plaintiff alleges that defendant discriminated against him on the basis of a perceived disability – namely alcoholism – in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* and Ohio Revised Code § 4112. Because the record demonstrates that plaintiff did not receive an assignment as a school bus driver because he was caught drinking on the job, no violation of the ADA occurred. We therefore affirm the judgment of the district court.

Plaintiff was hired by defendant as a bus driver in 1984. He is a member of the union, known as the Barnesville Association of Classified Employees, OEA/NEA. In 1991 he bid for and was awarded a custodial position with defendant. Shortly after beginning his custodial duties, Robert Miller, the president of the school board, observed plaintiff drinking beer while on the job at an elementary school. When confronted by Miller, plaintiff denied the allegation and left the building, even though his shift was not over. Upon completion of an investigation, the school board recommended that plaintiff be terminated for consuming alcohol at work, leaving his post and for conduct in violation of the stated "drug-free workplace" policy. Plaintiff ultimately admitted that he had been drinking a beer while on duty on school grounds. After intervention by the union, plaintiff was allowed to keep his position if he signed a document entitled "Last Chance Agreement." The terms of the agreement required plaintiff (1) to admit to an unspecified "drinking problem;" (2)

successfully to complete an approved alcohol rehabilitation program; (3) to accept a four-week suspension without pay and (4) to submit to alcohol and drug testing upon request for two years. Plaintiff signed the agreement and there is no dispute that he has at all times complied with the terms of the Last Chance Agreement. (Plaintiff was never asked to submit to a drug test during the two-year period and defendant acknowledges that it never had any reason to believe that plaintiff abused alcohol during that period.)

In December 1994, plaintiff submitted bids for a part-time bus driver position and a part-time bus garage worker position. Although plaintiff was the most senior worker to bid for the positions, defendant rejected him, citing the 1991 beer incident. Plaintiff filed a grievance with the union and in August 1995, after a binding arbitration hearing in compliance with the union's collective bargaining agreement with defendant, plaintiff was awarded the bus driver and garage worker positions on which he had bid in December 1994. The arbitrator based his decision solely on the terms of the bargaining agreement between the union and defendant, finding that the school board had not demonstrated that plaintiff posed a safety threat and therefore the seniority provisions of the labor agreement could not be overridden. Arbitrator's Opinion and Award, Aug. 10, 1995.

Defendant appealed the arbitrator's decision to the Belmont County Common Pleas Court, which reversed and vacated the labor arbitration award. *In the Matter of Barnesville Exempted Village School Dist. Bd. of Educ. v. Miller,* 1997 Ohio App. LEXIS 5253 (Belmont Cty. 1997). On appeal, the Ohio Court of Appeals reversed the Court of Common Pleas and reinstated the arbitrator's award.

Barnesville Exempted Village School Dist. Bd. of Educ. v. Barnesville Ass'n of Classified Employees, 123 Ohio App. 3d 272, 704 N.E.2d 36 (1997). The Court of Appeals reversed the Court of Common Pleas, holding that the arbitrator's award must be upheld unless the decision bears "no connection" with the labor contract. 123 Ohio App. 3d at 276, 704 N.E.2d at 38. The Court of Appeals found that the arbitrator carefully weighed the competing concerns of safety and seniority and the state court could not overrule the decision simply because it disagreed with the outcome. *Id.* Defendant appealed to the Ohio Supreme Court, which did not allow the discretionary appeal. *Barnesville Exempted Village School Dist. Bd. of Educ. v. Barnesville Ass'n of Classified Employees,* 81 Ohio St. 3d 1421, 688 N.E.2d 1046 (1998). Plaintiff was awarded the positions he sought in December 1994[1] and began his duties in February 1998. He was not awarded back pay or any other remuneration for lost wages or benefits.

Plaintiff filed this suit under the federal and state disability discrimination laws in September 1997, during the pendency of the arbitration proceedings. Both parties have filed briefs asserting that the arbitration proceeding under the collective bargaining agreement does not bar our review of plaintiffs federal discrimination claim. They cite *Wright v. Universal Maritime Serv. Corp.* 525 U.S. 70 (1998) (terms of

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[1] During the pendency of the arbitration proceedings and subsequent state court proceedings, plaintiff continued to bid on available bus driver and garage worker positions' when they became available. His bids were rejected each time.

collective bargaining agreement must contain "clear and unmistakable" language waiving specific federal statutory rights) and *Bratten v. SSI Servs., Inc.* 185 F.3d 625 (6th Cir. 1999) (same). We therefore do not decide the res judicata issue. We note that because plaintiff was subsequently awarded the positions he sought in his federal complaint as a result of the arbitration proceedings, plaintiffs request in his complaint that he be awarded the positions of bus driver and garage worker is moot and the only issue before us is whether plaintiff should be awarded compensatory and punitive damages, including back pay for the period from December 1994 to February 1998, due to defendant's alleged discrimination.

To prevail in a disability discrimination case, plaintiff must present either direct evidence of discrimination or present a prima facie case of discrimination. To establish a prima facie case under the Americans with Disabilities Act, plaintiff must show: (1) he was "disabled" under the ADA; (2) he was otherwise qualified to perform the essential functions of the job; (3) he suffered an adverse employment action and (4) a nondisabled person replaced him. *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1186 (6th Cir. 1996). Once the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. The burden then shifts back to plaintiff to demonstrate that the employer's stated reason is a pretext for discrimination. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).[2]

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[2] Both federal and Ohio disability discrimination actions require the same analysis. *Little Forest Med. Ctr. V. Ohio Civ. Rights Comm'n,* 61 Ohio St. 3d 607, 575 N.E.2d 1164, 1167

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The term "disability" is defined as:

> 1. a physical or mental impairment that substantially limits one or more major life activities;
>
> 2. a record of such impairment; or
>
> 3. being regarded as having such an impairment.

42 U.S.C. § 12102(2). Plaintiff denies that he has a physical or mental impairment and instead relies on either the second or third criteria to establish that he is "disabled;" that is, "having a record of such impairment" or being "regarded as" having such an impairment.[3] The district court granted summary judgment to defendant because it found that plaintiff had not established that his disability -- whether perceived or real -- "substantially limits one or more major life activities." While we do not necessarily disagree with the district court's reasoning, we affirm on a different ground.

This Court has held that there is a distinction between

(1991).

[3] Plaintiff stated that he signed the Last Chance Agreement, in which plaintiff admitted to a "drinking problem," because it was the only way he could keep his job.

taking an adverse job action for unacceptable misconduct and taking such action solely because of a disability, even if the misconduct is "caused" by the disability. *Maddox v. University of Tennessee,* 62 F.3d 843, 847 (6th Cir. 1995). In *Maddox,* an assistant football coach at the University of Tennessee was fired after an arrest for driving while intoxicated. The coach argued that his alcoholism was a covered disability and that his conduct of driving while impaired resulted from his disability, thereby precluding the university from firing him. This court assumed without deciding that alcoholics may be "individuals with a disability" for purposes of the ADA. The court held that the ADA specifically provides that an employer may hold an alcoholic employee to the same performance and behavior standards to which the employer holds other employees "even if any unsatisfactory performance is related to the alcoholism of such employee," thereby clearly distinguishing the issue of misconduct from one's status as an alcoholic. 42 U.S.C. § 12114(c)(4).

Maddox controls this case. Plaintiff makes much of the fact that defendant represented throughout the arbitration and Ohio state court proceedings that plaintiff had an "admitted drinking problem" based on the Last Chance Agreement he signed after the beer drinking incident at the school. We will assume without deciding that defendant does perceive that plaintiff suffers from alcoholism, a disability, and that plaintiff has established a prima facie case of disability. We then turn to defendant's stated reason for rejecting plaintiff's bids. Defendant stated that plaintiff was denied the jobs as a bus driver and garage worker in 1994 based on the 1991 beer drinking incident during work hours at an elementary school. The defendant asserts that the law

should not require it to put a person guilty of drinking on the job in the driver's seat of a school bus hauling children.

The ADA does not protect plaintiff from his own bad judgment in drinking on the job. The plaintiff cannot force defendant to hire him as a school bus driver when there is a serious risk that he may again drink on the job, have an accident and kill a group of school children. Any suggestion to the contrary is absurd on its face. For a federal court to interpret the ADA to require a school board to hire as a school bus driver a person guilty of drinking on the job and thereby run the risk of an accident would raise serious constitutional problems. If an accident should occur and students were injured or killed, the school board would be subject to large compensatory and punitive damages and open itself to the moral condemnation of the community. Therefore, even if we assume that plaintiff has established a prima facie case of discrimination, defendant has articulated a legitimate, non-discriminatory reason for its actions. Plaintiff has not demonstrated that this stated reason is a pretext for any unlawful discrimination.

For the foregoing reasons, we affirm the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed February 2, 1999]

No. 97CV00992

Dennis L. MARTIN,
Plaintiff,

v.

BATESVILLE EXEMPTED VILLAGE SCHOOL DISTRICT BOARD OF EDUCATION,
Defendant.

ORDER AND OPINION

MARBLEY, District Judge.

This matter is before the Court on Defendant's Motion for Summary Judgment. Plaintiff brings this action alleging violations of his rights under the Americans with Disability Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*, and Ohio

Revised Code ("Revised Code") § 4112.02.[1] For the reasons stated below, Defendant's Motion is hereby GRANTED.

I.

On April 17, 1984, Plaintiff, Dennis Martin, was hired as a bus driver by Defendant, Barnesville Exempted School District Board of Education. Plaintiff became a member of the Barnesville Association of Classified Employees, OEA/NEA ("Union") soon after his hire. On July 31, 1991, Plaintiff bid for and was awarded an afternoon custodian position.[2]

On November 6, 1991, Robert Miller, the president of the school board, observed Plaintiff consuming beer while on the job at an elementary school building. When Mr. Miller confronted Plaintiff about this conduct, Plaintiff denied the

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[1] Plaintiff submits and the Court agrees that Ohio disability actions and federal disability actions require the same analysis. *See Hoffman v. Fidelity Brokerage Servs., Inc.*, 959 F.Supp. 452, 457 n. 1 (S.D.Ohio 1997) ("The essential elements of a claim under the ADA and the Ohio handicap discrimination statute are the same"). Thus the state and federal disability claims will be discussed under the federal ADA guidelines.

[2] Pursuant to a collective bargaining agreement, employment positions with Defendant are filled through a process on which applicants submit bids for available positions and Defendant awards positions to successful bidders. Under the collective bargaining agreement, vacant positions were to be awarded to the employee having the greatest district seniority among those employees submitting bids.

incident and left the building. Mr. Miller filed a report with the Superintendent, David Wilson, who informed Plaintiff that he was suspended with pay pending investigation. Upon completion of the investigation, the School Board recommended that Plaintiff be terminated for consuming alcohol at work, leaving the building without adequate employee coverage, leaving his work incomplete, and for conduct in direct violation of Defendant's "drug free work place" policy. As a result of Union negotiations, however, Plaintiff and Defendant entered into a Last Chance Agreement ("LCA") which allowed Plaintiff to keep his job. The LCA required Plaintiff: (1) to admit "that he has a problem with consumption of alcohol; he has a drinking problem;" (2) to enter into an alcohol rehabilitation program; (3) to accept a four week suspension without pay; and (4) to submit to drug and/or alcohol testing upon request for two years. In compliance with the LCA, Plaintiff entered and completed a 28-day alcohol rehabilitation program. He has worked for Defendant without incident since 1991. In addition, due to lack of suspicion, Defendant did not subject Plaintiff to drug or alcohol testing during the two year probation period.

From 1994 to 1997, Plaintiff unsuccessfully attempted to secure available positions with Defendant. On November 22, 1994, Plaintiff submitted a bid for a bus mechanic position. Plaintiffs bid was rejected. Defendant's stated reason for rejecting Plaintiff's bid was that Plaintiff was not the individual with the most seniority for the position's classification. In December 1994, Plaintiff submitted bids for a bus garage worker position and a bus driver position. Plaintiff's bids were again rejected, this time based on the 1991 beer incident. In turn, Plaintiff filed a grievance with the Union for the denial of his bids. In the fall of 1995,

Plaintiff submitted a bid for a school bus driver position. Defendant did not consider Plaintiff's bid for the position.

On May 16, 1997, Plaintiff's grievance for the denial of the bus garage worker and bus driver positions was submitted to binding arbitration. The arbitrator found that there was no evidence that Plaintiff had an alcohol problem that precluded him from being qualified for the positions. Defendant filed a Motion to Vacate the Arbitrator's Award in the Ohio Court of Common Pleas for Belmont County. The Common Pleas Court found that "the [arbitrator's] award . . . was irrational and arbitrary, and held that the award should be [reversed and] vacated." In the Matter of *Barnesvllle Exempted Village School District Board of Education v. Miller*, 1997 Ohio App. LEXIS 5253 *3 (Belmont Cty. 1997). On appeal, the Court of Appeals reversed the Common Pleas Court and reinstated the arbitrator's award. *See Id.*

In August, 1997, Ptaintiff submitted a bid for a position as a School Bus Aid. Again, Plaintiff was not awarded the position. Defendant's reasons for not awarding Plaintiff the position are unclear from the record. On September 5, 1997, Plaintiff filed this action, alleging federal and state disability discrimination.[3] On February 17, 1998, after exhausting its state appeals relating to the arbitration proceedings, Defendant awarded Plaintiff the bus garage

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[3] Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission on January 22, 1997, and has requested a right to sue letter. There is no indication in the papers submitted to the Court whether the EEOC granted the right to sue.

worker and bus driver positions that he bid for in 1994. On September 9, 1998, Defendant filed this Motion for Summary Judgment pursuant to Fed.R.Civ.P. 56.

II.

According to Fed.R.Civ.P. 56, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56, The movant has the burden of establishing that there are no genuine issues of material fact, which may be accomplished by demonstrating that the nonmoving party lacks evidence to support an essential element of its case. *See Celotex Corp. v. Catrett,* 477 U.S, 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Barnhart v. Pickrel, Schaeffer & Ebeling Co., L.P.A.*, 12 F.3d 1382, 1388-89 (6th Cir, 1993). The nonmoving party must then present "significant probative evidence" to show that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 339-40 (6th Cir. 1993). "[S]ummary judgment will not lie if the dispute is about a material fact that is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (summary judgment appropriate when the evidence could not lead a trier of fact to find for the non-moving party).

In evaluating a motion for summary judgment the evidence must be viewed in the light most favorable to the non-moving party. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). The mere existence of a scintilla of evidence in support of the non-moving party's position will be insufficient; there must be evidence on which the jury could reasonably find for the non-moving party. *See Anderson*, 477 U.S. at 251, 106 S.Ct. 2505; *see also Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995).

In the employment discrimination context, a plaintiff must present a *prima facie* case to survive a defendant's motion for summary judgment. To establish a *prima facie* case under the ADA, a plaintiff must show: (1) he was a disabled person within the meaning of the ADA; (2) he was otherwise qualified to perform the essential functions of the job; (3) he suffered an adverse employment action under circumstances giving rise to an inference of unlawful discrimination; and (4) a non-disabled person replaced or was selected for the position that the disabled person sought. *See Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 779 (6th Cir. 1998) (citing *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1186 (6th Cir. 1996)).

Once a plaintiff has established a *prima facie* case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Cehrs*, 155 F.3d at 779. The burden then shifts back to the plaintiff to demonstrate that the employer's proffered reason is a pretext for unlawful discrimination. *See St. Mary's Honor Center v. Hicks*, 509

U.S. 502, 507-08, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). Once the burden of production shifts back to the plaintiff, the evidence produced to show a *prima facie* case and the "inferences drawn therefrom may be considered by the trier of fact on the issue of whether the [employer' s] explanation is pretextual." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n. 10, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

III.

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a); *see also Roush v. Weastec, Inc.*, 96 F.3d 840, 843 (6th Cir. 1996). The term "qualified individual with a disability" includes individuals that have successfully completed a rehabilitation program and no longer engage in prohibited use.[4] *See* 42 U.S.C. § 12114(b)(1)

The ADA defines the term "disability" as:

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[4] "Qualified individuals with a disability" includes individuals with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. *See* 42 U.S.C. § 12111(8)

> (1) a physical or mental impairment that substantially limits one or more major life activities;
> (2) a record of such an impairment; or
> (3) being regarded as having such an impairment.

See 42 U.S.C. § 12102(2)(A). The first criterion, a physical or mental impairment that substantially limits one or more major life activities, does not apply this case. Plaintiff denies that he has a physical or mental impairment. Plaintiffs argues that the Defendant acted on the basis of his having either a "record of" an impairment, *viz.*, alcohol dependency, or being "regarded as" having such impairment. The Court's analysis, therefore, must focus on the second and third criteria of the disability definition. The regulations promulgated by the Equal Employment Opportunity Commission ("EEOC") indicate that in order to have a "record of" an impairment, an individual must have a history of, or be misclassified as having an impairment that substantially limits a major life activity.[5] *See* 29 C.F.R. § 1630.2(k). The regulations specifically enumerate ways an individual can demonstrate that he was "regarded as" having an impairment that

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[5] The ADA empowers agencies, such as the EEOC, to develop plans, regulations, and guidelines, to assist entities covered under the ADA in understanding their responsibilities under the Act. *See* 42 U.S.C. § 12206.

substantially limits one or more of the major life activities.[6] *See* 42 U.S.C. § 12102(2)(A)(3).

Although the three definitions of disability are distinct, they have a common component. Under each definition, the disability – real or perceived – must be one that substantially limits one or more major life activities. The EEOC's Interpretive Guidance provides that "[d]etermining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled . . . An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities." 29 C.F.R. App. § 1630.2(j). Major life activities include "functions such as caring for one's self, performing

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[6] The EEOC Regulations provide that there are three ways a plaintiff can show that he is "regarded" as having a disability:

> (1) The individual may have an impairment which is not substantially limiting in a major life activity but is perceived by the employer . . . as constituting a substantially limiting impairment;
> (2) the individual may have an impairment which is only substantially limiting in a major life activity only because of the attitudes of others toward the impairment; or
> (3) the individual may have no impairment at all but is regarded by the employer. . . as having a substantially limiting impairment.

29 C.F.R. § 1630, App. B, § 1630.2(I).

manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R, § 1630.2(i); 28 C.F.R. § 35.104. The term "substantially limits" mean inability to perform, or a severe restriction on the ability to perform, as compared to the average person in the general population. *See* 29 C.F.R. § 1630.2(j)(1).

Plaintiff maintains that he is not an alcoholic and has never had a drinking problem. He states that he was unlawfully subjected to adverse employment decisions based on a "record of" alcohol problems and due to Defendant "perceiving" him as having a drinking problem. Thus, Plaintiff argues that he is disabled under the ADA and protected as a qualified individual with a disability. Plaintiff's argument is misplaced.

Having a history of, or being misclassified as having an impairment, is only the first step in an analysis under the ADA. Plaintiff must also show that the "record of" impairment, or the impairment that he is "regarded as" having, is one that substantially limits a major life activity. Plaintiff maintains that the LCA containing his admission of alcohol abuse, establishes a "record of" a drinking problem. Plaintiff further contends that Defendant made adverse employment decisions with regard to his bids for positions because Defendant perceived him as having a drinking problem. Plaintiff did not allege in his complaint, nor has he argued or demonstrated in respect to Defendant's Motion, that the LCA establishes that he is substantially limited in a major life activity, or that Defendant regarded him as having an impairment that substantially limits a major life activity. In fact, Plaintiff has not attempted to prove that the disability he

is alleged to have had substantially limits any major life activity.

At oral argument, Plaintiff argued that in a "record of" or "regarded as" case, the ADA does not require a showing that the alleged impairment substantially limits a major life activity. This reading of the statute is incorrect. To establish a *prima face* case, the statute requires that the impairment - real, recorded, or perceived - substantially limits a major life activity. *See* 42 U.S.C. § 12102(2)(A). Case law in the Sixth Circuit has been unequivocal that under each definition of disability, a plaintiff must show that the alleged impairment substantially limits a major life activity. *See Koesis v. Multi-Care Management, Inc.*, 97 F.3d 876, 885 (6th Cir. 1996); *Roush v. Weastec, Inc.*, 96 F.3d 840, 844 (6th Cir. 1996); *Cehrs*, 155 F.3d at 780-81; *see also Green v. Rosemont Industries, Inc.*, 5 F.Supp.2d 568, 572 (S.D.Ohio1998). When, as in this case, there is no showing that Plaintiff's alleged impairment substantially limits a major life activity, Plaintiff cannot establish a *prima facie* case under the "record of" or "regarded as" definitions of disability. As such, Defendant is entitled to summary judgment.

Plaintiffs reliance on *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir. 1997), is misplaced. In *Miners*, an employee of a radio station was terminated because the radio station allegedly regarded her as being alcoholic. *Id.* at 823. The radio station gave the employee the choice between entering a chemical-abuse program or being fired. *Id.* at 822. Rather than enter the rehabilitation program, the employee chose to be fired. *Id.* The employee brought suit and the district court granted the radio station's motion for summary judgment. *Id.* On

appeal, the Eighth Circuit reversed the district court, because the trial court had failed to decide whether the employee presented a *prima facie* case of discrimination before it analyzed the radio station's proffered reasons for the firing. *Id.* at 823. The *Miners* court concluded that the employee had established a *prima facie* case of discrimination under the ADA because evidence was presented indicating that the radio station regarded the employee as being an alcoholic. The Court did not, however, reach issue of whether Plaintiff's perceived impairment substantially limited a major life activity. The *Miners* court merely states that the radio station regarded the employee as an alcoholic and thus, the employee was disabled within the meaning of the ADA.

In the Sixth Circuit, however, merely showing that an individual suffers from an impairment is only the first step the disability analysis. *Koesis*, 97 F.3d at 885; *see also* 29 C.F.R. App. § 1630.2(j). Plaintiff must also show that he is substantially limited in a major life activity. *Id.* Accordingly, this Court cannot follow the reasoning in *Miners*, as it simply does not address the substantially limits question which is at issue in this case.

In an ADA action, Plaintiff must establish a *prima facie* case of discrimination to survive summary judgment. Plaintiff has not presented evidence showing that he is disabled under the "record of" or "perceived as" definitions of disability. As such, Plaintiff cannot establish a *prima facie* case of disability discrimination. Defendant's Motion for Summary Judgment, therefore, is hereby GRANTED.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed June 12, 2000]

No. 99-3263

DENNIS L. MARTIN,
Plaintiff-Appellant,

v.

BARNESVILLE EXEMPTED VILLAGE SCHOOL DISTRICT BOARD OF EDUCATION,
Defendant-Appellee.

BEFORE: MERRITT, DAUGHTREY, and MAGILL,* Circuit Judges.

* Hon. Frank J. Magill, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

Supreme Court, U.S.
FILED
OCT 13 2000

(2)

No. 00-384

IN THE

Supreme Court of the United States

DENNIS L. MARTIN,

Petitioner,

v.

BARNESVILLE EXEMPTED VILLIAGE SCHOOL DISTRICT BOARD OF EDUCATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. SHOULD THE PETITIONER BE PERMITTED TO RAISE ISSUES FOR THE FIRST TIME BY WAY OF HIS PETITION FOR WRIT OF CERTIORARI, WITHOUT SAID ARGUMENTS HAVING BEEN RAISED IN EITHER COURT BELOW?

II. SHOULD THIS COURT GRANT A WRIT OF CERTIORARI TO REVIEW QUESTIONS FOR WHICH THERE IS NO CONTROVERSY OR CONFLICT AMONG THE CIRCUITS, BUT RATHER ARE A MATTER OF EXPRESSED STATUTORY LANGUAGE?

III. SHOULD THIS COURT GRANT A WRIT OF CERTIORARI TO REVIEW QUESTIONS WHICH PRESENT CONFUSION ONLY TO PETITIONER, AND NOT AMONG THE CIRCUIT COURTS?

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2. CONTRARY TO PETITIONER'S ASSERTION, APPLICATION OF THIS COURT'S DECISION IN *REEVES V. SANDERSON* PLUMBING PRODUCTS, INC., TO THE INSTANT CASE, DOES NOT MANDATE A JURY TRIAL BASED ON THE EVIDENCE PRODUCED 10

A. The Rehabilitation Certificate does not support Martin's claim. 12

B. The Last Chance Agreement does not support Martin's claim. 13

C. Neither Court below "raised the burden of proof" required by a plaintiff. 15

3. PETITIONER'S ARGUMENT THAT THE TERM 'REGARDED AS' SHOULD BE CONSTRUED TO ALLOW ALCOHOLISM AS A PER SE DISABILITY IS A MISREADING AND MISUNDERSTANDING OF THE STATUTE AND AGENCY REGULATIONS - NOT AMBIGUITY OR CONFLICT REQUIRING THIS COURT'S ATTENTION. 16

A. Petitioner's reading of the law and accompanying regulations is erroneous, and exhibits a fundamental misunderstanding of proof required for claims of a "perceived" disability. 16

B. Contrary to Petitioner's assertion, there is no conflict between agency regulations in this area. 17

4. CONTRARY TO PETITIONER'S ASSERTION, THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS AS TO WHETHER OR NOT ALCOHOLISM IS A PER SE DISABILITY 18

A. The "impairment" of alcoholism is not a *per se* "disability" under the ADA. 19

B. Petitioner Martin's reliance upon the Eighth Circuit decision in *Miners v. Cargill Communications, Inc.*, is misplaced and in fact contradicts his own arguments. 23

1. Petitioner's cite to *Miners v. Cargill Communications, Inc.*, is not appropriate. 23

2. Petitioner Martin's arguments with respect to the "misconduct exception" do not present a circuit conflict or need for clarification by this Court. The decisions of the lower courts were entirely proper and do not warrant review or clarification by this Court. 25

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COUNTER STATEMENT OF THE CASE

The United States District Court for the Southern District of Ohio correctly determined that:

> Plaintiff must [show] that the 'record of' impairment, or the impairment that he is 'regarded as' having, is one that *substantially limits a major life activity*. *** Plaintiff **did not allege in his complaint, nor has he argued or demonstrated** in response to Defendants Motion, that the LCA establishes that he is *substantially limited in a major life activity*, or that Defendant regarded him as having an impairment that *substantially limits a major life activity*.

R.30 Order Granting Summary Judgment, p. 9 (Emphasis theirs).

The trial court essentially found that Martin must prove that the alleged "record of" impairment or the "perceived" impairment is one that *substantially limits a major life activity*, (or is perceived as being so limiting) and that Martin entirely failed to put forth an argument and establish this burden.

While not disagreeing with the trial court's reasoning, the Sixth Circuit Court of Appeals affirmed the decision of the district court on a different ground. Instead of deciding the case based upon the fatal errors in Martin's *prima facie* case (*i.e.*, failing to produce evidence of a perception of alcoholism and failure to even allege a perceived substantial limitation), the court of appeals took a more rigid stance and

declared the case law of *Maddox v. Univ. of Tenn.*, 62 F.3d 843 (6th Cir. 1995), controlling, holding that Martin's own misconduct (rather than the unproven perception of alcoholism) was a legitimate and non-discriminatory reason for his denial of the school bus driver position.

STATEMENT OF FACTS

Barnesville Exempted Village School District BOE (herein after "Barnesville"), in accordance with S.Ct.R. 15 (2) with respect to the content of a Brief in Opposition, wishes to draw this Court's attention to the misstatements and omissions of Petitioner Dennis L. Martin (hereinafter "Martin") that are directly relevant to issues presented herein.

First, the Petition submitted by Martin is replete with mischaracterizations, understatements, and overstatements as to the facts and law in this case. The Petition also exhibits a fundamental misunderstanding with respect to the law and interpretations of law surrounding the "record of" and "regarded as" prongs of the ADA's *prima facie* showing for a disability. There are many fatal flaws - most of which defy common sense interpretation of the language of the statute and the regulations or interpretive guidelines on the subject. Many of these misunderstandings are addressed specifically in the Law and Argument portion of this brief, as necessary

Second, as the Court may well have already discerned, this case involves an incident of misconduct in 1991 whereby Petitioner Martin was caught drinking on his job as a custodian at an elementary high school. Three years later Martin applied for a bus driver position within the school district. Martin was denied the bus driver position because of his 1991 misconduct, and because the school officials (without any knowledge or perceptions of any alcoholism on the part of Martin) could simply not take the chance that Martin would attempt to engage in similar misconduct while holding the bus driver position.

With respect to the detailed facts as set forth by Martin, there are several key omissions. While Martin admits to having been "discovered" drinking beer while on his job as a custodian at an elementary high school in 1991, Martin fails to discuss the relevant circumstances surrounding the incident. Martin was caught by Robert Miller, President of Barnesville's Board of Education. Once caught, Martin RAN from Board President Miller, HID, and attempted to throw away the remaining six pack of beer. When confronted, Martin LIED about the fact that he had any beer on premises, and DENIED that Board President Miller had seen what he claimed. It was only AFTER the other cans of beer were discovered that Martin admitted bringing the beer to the elementary school. When questioned further, after the extra beer was found, Martin walked off the job leaving the elementary school building otherwise unattended. The Superintendent at the time, David Wilson, recommended that Plaintiff be terminated for reasons of:

- consuming alcohol at work
- leaving his work incomplete

- leaving the building without adequate employee coverage and
- for conduct in direct violation of the Defendant's "drug free work place" policy, constituting misfeasance and nonfeasance of duty

Thus, Martin was not disciplined because he was perceived to have an impairment that substantially limited any major life activities, or because he was perceived as an alcoholic. Martin was disciplined because he violated Barnesville rules, lied, and walked off the job. Ultimately, because it was around Christmas time, Board President Miller decided to give Martin a last chance, and the parties entered into a last chance agreement (hereinafter "LCA"). In this agreement, Martin accepted a suspension from employment without pay, waived procedural irregularities, stated that he had a drinking problem, and agreed to enter an alcohol rehabilitation program.

It must be noted that Board President, Mr. Miller, specifically testified that he had no idea whether or not Mr. Martin had a drinking problem, but indicated he would let the professionals determine that at an alcohol rehabilitation program, and that Martin would be none the worse by completing same. (R.13 Deposition of Miller, pp 53-54). Martin did enter and complete the alcohol program, and upon doing so returned to his custodial position. Martin testified in his deposition that during the alcohol rehabilitation program, he still did not believe he needed the treatment, and after it was completed, also felt he did not need the treatment. (R11 Motion for Summary Judgment, exhibit 1, Deposition of Martin, pp.51-53). Martin never followed up with any other type of rehabilitation treatment after he completed

the program. (R11 Motion for Summary Judgment, as exhibit 1, Deposition of Martin, p.55).

In December of 1994, a bus garage worker position and a bus driver position were posted. Martin bid for, and was denied these positions pursuant to the "safety concern" clause of the bargaining agreement. Martin grieved these decisions, and the matter was appealed to State Court. The Belmont County Court of Common Pleas upheld the actions of Barnesville, as a matter of "safety" and not "seniority." Thus, from July 2, 1996 until October 15, 1997, Barnesville was under that court's decision that Martin was not entitled to the positions. While the State Court appeal was pending, Martin filed charges of disability discrimination with the Ohio Civil Rights Commission in November 1996. In early 1998, Martin was awarded the December 1994 positions of bus garage worker and bus mechanic pursuant to the finality of the Seventh District Court of Appeals decision dated October 15, 1997.

Petitioner Martin instituted this action in September of 1997 claiming disability discrimination with regard to the denied positions. Barnesville filed a Motion for Summary Judgment which set forth numerous issues upon which summary judgment could properly have been granted. (R. 11 Motion for Summary Judgment). Martin argued, and continues to argue, that he signed the last chance agreement, stated therein that he had "a drinking problem," and therefore has "a record of" and is "perceived as" an alcoholic. As the trial court correctly found, Martin failed to allege, argue or demonstrate that he was perceived as having an impairment, that he was perceived as being substantially limited by that impairment, and/or failed to identify major life activities that

were so limited. (R.30 Order Granting Motion for Summary Judgment, pp.8-9). Martin did not rebut the testimony of witnesses who clearly stated that they did not know if Martin was an alcoholic, but merely that they did not want to take the chance that he would engage in similar acts of misconduct while driving a school bus. (R. 11 Motion for Summary Judgment, p.9, *citing*, exhibits 2- Lucas affidavit, 3- Wilson affidavit, 4- Rinehart affidavit, and 5- Miller affidavit).

Martin did not address the arguments advanced by Barnesville regarding the applicable McDonnell-Douglas/Burdine burden shifting analysis. (R. 14 Response to Motion for Summary Judgment). Martin also did not address Barnesville's argument under the law of *Maddox v. Univ. of Tennessee,* 62 F.3d 843 (6th Cir. 1995), that Barnesville did properly distinguish between Martin's misconduct and the alleged perceived "disability." Martin entirely skipped his proof on these issues. (R. 14 Response to Motion for Summary Judgment). Martin simply alleged perceived alcoholism and therefore disability.

Martin now advances theories of (1) an erroneous application of the "regarded as" inquiry; (2) several novel theories of recovery, not raised in either court below (heightened standard for a plaintiff under a burden shifting analysis and "regarded as" equals "*per se* disability") ; and (3) an alleged conflict among the circuits with respect to the disability *per se* argument as it relates to "perceived" alcoholism. All this, while failing to produce evidence from which a reasonably jury could find that Martin was even "perceived as" an alcoholic; failing to even address below that Martin was "perceived as" being substantially limited in a major life activity;

and failing to identify a major life activity perceived to be limited.

In short, Martin asks this Court to make numerous successive leaps in logic and inference, all of which are contrary to express statutory language, agency interpretive regulations and guidelines, and stated Congressional intent. Martin has skipped the proof on many issues, not the least of which is a *prima facie* showing of disability, and now asks this Court to declare him disabled despite his own default.

ARGUMENTS IN OPPOSITION TO THE GRANTING OF CERTIORARI

This Court should properly deny the Petition for Writ of Certiorari submitted by Petitioner Dennis L. Martin, as it fails to present issues in conflict among the circuit courts, fails to set forth genuine issues in need of clarification by this Court with respect to important federal questions, and for reason that Petitioner Martin failed to raise many of these issues in either court below.

Specifically, Petitioner Martin suggests that there are conflicts (1) between the circuit courts as to whether or not alcoholism is a *per se* disability under the ADA and (2) between Justice Department and EEOC regulations which define "regarded as having such an impairment." With respect to a conflict among the circuit courts as to alcoholism as a *per se* disability, no such conflict exists, and the cases cited *infra.*, in Argument No. 3, Section A, indicate as much. Petitioner's citation to *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir. 1997), as in conflict with the Sixth Circuit decision herein below is erroneous. With respect to conflict among agency regulations, Petitioner Martin misreads and/or

misunderstands the express language of both statute and regulation, thereby creating a false conflict, when in fact, it is only Martin who perceives conflict - not the circuits. Review of Appendices B and C indicate a plain misreading by Martin. Additionally, Petitioner Martin assigns errors with respect to the Sixth Circuit Court's ruling against him based on his own misconduct. This is the first time Martin has even responded to Respondent Barnesville's arguments with respect to misconduct. Martin wholly failed to address this area in either his Memorandum Contra Motion for Summary Judgment, his Sixth Circuit Appellate Brief or his Sixth Circuit Reply Brief. Nonetheless, the "misconduct exception" as it is termed, does not raise a plaintiff's burden of proof when raised by an employer, nor does it create a non-rebuttable non-discriminatory explanation for employer action. Ironically, it is Petitioner's own citation to *Miners v. Cargill Communications, Inc., supra.*, out of the Eighth Circuit which illustrates the fallacies in Martin's argument with respect to burden of proof in misconduct cases. Finally, Martin assigns as error, the lower courts' application of this Court's decision *in Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000). Ironically, not only did the lower courts correctly apply the *Reeves* analysis, but Martin's own citation to *Miners v. Cargill Communications, Inc., supra.*, illustrates how this is so. No further explanation is necessary from this Court regarding the issue of burden shifting and rebuttals of proffered employer explanations there being no departure from the *Reeves, supra,* standard.

Ultimately, Petitioner Martin has asserted arguments for which no conflict exists or no clarification is necessary from this Honorable Court. Petitioner Martin's own misreading or misunderstanding of express statutory and regulatory lan-

guage does not represent conflict or confusion among the circuits (or the Sixth Circuit) so as to create a necessity for this Court's review.

ARGUMENT NO. 1

Petitioner Martin Should Not Be Permitted To Raise Certain Issues For The First Time By Way Of His Petition For Writ Of Certiorari. *Bragdon V. Abbott*, 524 U.S. 624, 118 S.Ct 2196, 141 L.Ed.2d 540 (1998).

Petitioner Martin advances several arguments or theories upon which he contends this Court should rely to overturn the decision of the Sixth Circuit Court of Appeals - theories that were not raised in either court below and therefore are not properly before this Court. *See, Bragdon v. Abbott*, 524 U.S. 624, 118 S.Ct. 2196, 2205 (1998) ("It is our practice to decide cases on the grounds raised and considered in the Court of Appeals,..."). Specifically, Martin has alleged:

(1) Justice Department regulations for the Rehabilitation Act and the EEOC regulations (and interpretive guidelines) for the ADA are in conflict and that because alcoholism is a *per se* disability under the Rehabilitation Act, the same must be true under the ADA. This argument was not advanced below and as such, Martin's Petition for Writ of Certiorari should properly be denied;

(2) Applying the "misconduct exception" to disability discrimination, without a time limitation, would give an unrebuttable non-discriminatory reason for the employer's adverse action. It is interesting that Martin now seeks to challenge the Sixth Circuit's ruling

tin now seeks to challenge the Sixth Circuit's ruling with respect to his "misconduct" and proof a "misconduct exception," when he entirely failed to address the issue in either his Memorandum Contra Motion for Summary Judgment, Sixth Circuit Appellate Brief or Sixth Circuit Reply Brief. It is also interesting that Martin relies on the McDonnell Douglas - Burdine burden shifting analysis, when Martin's lower court motions and briefs entirely avoided this argument. Martin presented no argument to rebut the legitimate explanation of Barnesville's action.

(3) "As applied, the misconduct exception is against the intent of Congress because Congress supplied a similar the (sic) misconduct exception in 42 U.S.C. 12114(A) concerning drug uses, Congress further limited the use of such exception concerning drug uses, while the Sixth Circuit has not limited the similar judge made rule as to alcoholics."(Pet.p.25).

Martin should not properly be permitted to raise these issues without having raised them in either court below.

ARGUMENT NO. 2

Contrary To Petitioner's Assertion, Application Of This Court's Decision In *Reeves V. Sanderson* To The Instant Case, Does Not Mandate A Jury Trial Based On The Evidence Produced.

Petitioner Martin argues that the courts below failed to properly apply this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2109 (2000), and

particularly the analysis for burden shifting and inferences of discrimination presented to rebut an employer's legitimate non-discriminatory reasons for its action. Specifically Martin mistakenly claims: (1) he offered conflicting testimony of pretext so as to warrant submission of the issue to a jury; and (2) the District Court erred by requiring him to present "significant probative evidence" of pretext, and that in doing so the court made an improper determination of the persuasive nature of the evidence he presented. This, Martin argues, heightened the burden of a plaintiff attempting to prove pretext. These arguments are without legal and factual merit, and do not create a significant question for this Court's review.

In *Reeves, supra.*, this Court determined that, among other things:

> Certainly there will be instances where, although plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational fact finder could conclude that the action was discriminatory.
>
> Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include **the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered** on a motion for summary judgment.

Reeves, 120 S.Ct. at 2108. (Emphasis added).

> [I]f the record conclusively revealed some other, non-discriminatory reason for the employer's decision or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that "no discrimination had occurred," an employer would be entitled to judgment as a matter of law.

Reeves, 120 S.Ct. at 2109. (Emphasis added). A brief review of the evidence demonstrates that the case at bar is precisely the instance anticipated by the above quote. Further, Petitioner Martin's failure to apply the entire decision and import of *Reeves* does not make this an issue which must be clarified by this Court.

Martin essentially argues that he presented the LCA and rehabilitation certificate as proof of the "record of" his disability, and of Barnesville's pretext (*i.e.*, that they perceived him as being an alcoholic rather than being concerned for school children's safety). Martin contends this evidence rebuts Barnesville's proffered concerns for the safety of its students. Review of the facts here reveal that Martin's evidence is weak, does not prove or even lend inference to discriminatory intent on the part of Barnesville, and could not properly have led a rational fact finder to conclude there was discrimination.

A. The Rehabilitation Certificate does not support Martin's claim.

First, the rehabilitation certificate is only proof that Martin attended a program. No diagnosis was made of (and the mere

certificate certainly does not reflect) alcoholism. No diagnosis was made of (and the mere certificate certainly does not reflect) a substantial limitation of any major life activity, nor does it show a record or perception of such.

B. The Last Chance Agreement does not support Martin's claim.

Martin relies on the LCA as proof that he was perceived as an alcoholic. Martin alleges that "a drinking problem" equals alcoholism, and then automatically assumes "disability." That is not a proper showing under the ADA, and the district court correctly concluded such. Martin did not produce evidence that Barnesville's board members or employees considered the LCA terminology "a drinking problem" the equivalent of alcoholism, or of a substantially limiting impairment as to any major life activity.

The mere words "drinking problem" do not necessarily equate to alcoholism or disability. In fact, as used by these parties, "a drinking problem" was meant to convey insubordination, misconduct, and a mistake by Martin involving the use of alcohol while on the job, an offense for which Martin should properly have been terminated. When specifically questioned on the use of the terminology, "drinking problem," Board President Robert Miller explained that he did not know if Martin was an alcoholic or if he just exercised poor judgment on that occasion. (See Deposition of Robert Miller [excerpts], attached hereto as Appendix A).

Appellant Martin at no time presented evidence to address or rebut this testimony. However, Martin does acknowledge that he only signed the LCA to keep his job, not to admit any

type of alcoholism. (R.11 Motion for Summary Judgment, exhibit 1- Martin deposition, p. 51).

Further, no evidence was proffered by Martin that tended to prove an improper motive on the part of Barnesville - and how could it, as Barnesville is charged with the education and safety of the children within the school district, from the time they catch the morning school bus until the time they are dropped off the bus at days' end. Martin overstates and misunderstands what this Court's decision in *Reeves* requires of the parties, and what the court below was looking for - namely relevant probative evidence, tending to prove or disprove Barnesville's explanation - not merely bald assertions.

Petitioner Martin did not address the above testimony or the fact that none of the four (4) witnesses who testified considered him to be an alcoholic. Applying *Reeves, supra.*, these four (4) witnesses, plus the ultimate function and duty of Barnesville with respect to the education and care of the children on its buses, was *abundant, independent evidence* which supported Barnesville's explanation for denying Martin the bus driving position. The district court did properly apply the *Reeves* standard for burden shifting, and Martin's mere disagreement or failure to recognize the difference does not warrant this Court's intervention or clarification.

Ultimately, what Martin refuses to understand, is that he failed to make the required *prima facie* showing. Martin failed to produce any evidence that he was perceived as an alcoholic. Assuming *arguendo* that he did make such proof, Martin entirely failed to allege, argue and/or produce evidence that he was perceived as being substantially limited in a major life activity. Martin also failed to identify said major

life activity. According to this Court's decision in *Reeves, supra.*, Martin did not pass the first hurdle of bringing such an action.

C. Neither Court below "raised the burden of proof" aquired by a plaintiff.

Specifically, Martin claims that the District Court erred by requiring "significant probative evidence" to avoid summary judgment. The requirement of "significant probative evidence" did not create a new standard of proof for plaintiffs, but rather was a restatement that proffered evidence should be relevant, *i.e.*, having the tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable, than without the evidence. F.R.E. 401. It stands to reason that evidence being offered to prove a pretext, must do so, not merely raise collateral issues. Martin's evidence did not "tend to prove or disprove" any facts of consequence in this matter. The district court was not presented with evidence that created a conflict or genuine issue as to the truth or falsity of Barnesville's explanation for its denial of the school bus position to Martin. Martin's proffered evidence did not prove (or lend inference to) pretext or falsity on the part of Barnesville with regard to their actions or motivations. The semantics between "probative evidence" and "significant probative evidence" in no way assists Martin, because lack of evidence does not change: no proof of perceived alcoholism, no proof of perceived substantial limitation, and no proof that Barnesville's concerns for children's safety were false.

ARGUMENT NO. 3

Petitioner's Argument That The Term 'Regarded As' Should Be Construed To Allow Alcoholism As A *Per Se* Disability Is A Misreading And Misunderstanding Of The Statute And Agency Regulations Not Ambiguity Or Conflict Requiring This Court's Attention.

Petitioner's Argument No.2 illustrates a misunderstanding of the prima facie elements of a claim under the Americans With Disabilities Act, **not ambiguity or a conflict**. Petitioner's argument serves only to cloud the true issue and, coincidentally, the fatal error in Petitioner's case, namely that he failed to **allege and/or argue or produce any evidence** that Petitioner was "perceived as" having an impairment (alcoholism) and that he was "perceived as" being substantially limited in a major life activity from said alcoholism.

A. Petitioner's reading of the law and accompanying regulations is erroneous, and exhibits a fundamental misunderstanding of proof required for claims of a "perceived" disability.

Petitioner advances a convoluted argument with respect to the required showing under a "regarded as" claim under the ADA. Specifically Martin claims that he has:

> [The] impossible task of proving a negative. That is, if the Petitioner does not have a substantial limitation at all, how is it possible to prove that it actually limits a major life activity? In other words, no evidence can exist showing an employee is substantially limited in a major life activity, if the em-

ployee never had an impairment in the first place. (Pet. p.23.)

This is clearly a misunderstanding of what is required under a perceived disability claim.

As set forth in Barnesville Argument 4A, *infra.*, a plaintiff who claims to be regarded as disabled, must prove that he/she is *perceived as* being substantially limited in a major life activity as a result of a perceived impairment. This comports with the general premise of the ADA, that "The statute is not operative, and the definition [of disability] not satisfied, unless the impairment affects a major life activity." *Bragdon v. Abbott*, 118 S.Ct., 2196, 2204 (1998).

There is no actual limitation requirement unless the plaintiff is seeking to establish the claim as an actual disability (*i.e.*, actual impairment with actual substantial limitations). This is not a difficult concept. If a plaintiff claims to be regarded as disabled, they must prove that they are regarded as having an impairment and regarded as being substantially limited in a major life activity - whether or not the perception is correct. Very simply, Petitioner Martin's misunderstanding of the showing required (*i.e.*, a perceived substantial limitation of a major life activity) is not shared among the circuits and is not sufficiently compelling or in need of clarification for this Court to address.

B. Contrary to Petitioner's assertion, there is no conflict between agency regulations in this area.

Petitioner Martin misrepresents to this Court, a conflict between Justice Department regulations (drafted for implementation of the Rehabilitation Act) and EEOC regulations

(drafted for the ADA). Specifically, on page 20 of his Petition, Martin alleges that the Justice Department regulations and definitions do not require the showing that an employee is perceived as being substantially limited in a major life activity. This is clearly erroneous.

A quick reading of the Justice Department regulations, 28 C.F.R. 41.31(b)(4)(iii) (1999) (attached hereto as Appendix B) reveals that there most certainly is the required showing of perceived substantial limitation as to a major life activity. Martin's characterization of different wording between this regulation and that set forth in the EEOC's 29 C.F.R. '1630 (l)(3) (attached hereto as Appendix C) and 29 C.F.R. '1630 App.B '1630.2(l), *infra.*, is misleading at best. Martin's attempt to create a conflict worthy of this Court's attention is improper. The Petition may properly be denied on this basis.

ARGUMENT NO. 4

Contrary To Petitioner's Assertion, There Is No Conflict Among The Circuits As To Whether Or Not Alcoholism Is A *Per Se* Disability.

Martin's Petition claims that circuits other than the Sixth Circuit have determined that alcoholism is a disability under the ADA. (Pet.p22). This assertion is misleading, because there is no distinction made between an "impairment" (*i.e.*, the impairment of alcoholism) and a "disability" (defined as an "impairment that substantially limits one or more major life activities" or is perceived as being so limiting). Further, the cases cited in support of this proposition address other perspectives such as the Rehabilitation Act (*Office of the Senate Sergeant at Arms v. Office of Senate Fair Employ-*

ment Practices, 95 F.3d 1102 (Fed.Cir. 1996)), and the drug uses section of 42 U.S.C. 12114 (A)(*Buckley v. Consolidated Edison Co. of New York*, 127 F.3d 270 (2nd Cir. 1997)). Additionally, Martin's cite to *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir. 1997), is not appropriate and actually undercuts his own arguments.

A. The "impairment" of alcoholism is not a *per se* "disability" under the ADA.

The law is very clearly established by this Court and the circuits, that "The statute [ADA] is not operative, and the definition [of a disability] not satisfied, unless the impairment affects a major life activity." *See, Bragdon v. Abbott*, 118 S.Ct. 2196, 2204 (1998). So too, is this true for perceived impairments, *i.e.*, that a perception of substantial limitation in a major life activity be shown. This is properly so, in light of the expressed statutory language requiring this showing, the agency regulations and guidelines (with definitions) and available Congressional intent.[1] The Circuit

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[1] As this Court well knows, in order to prevail on a claim under the Americans With Disabilities Act, Plaintiff must prove that:

1. The Plaintiff suffers from a "disability" as defined by the Act;

2. The Plaintiff was otherwise qualified for the employment; and

3. The Plaintiff either was denied a reasonable accommodation for his disability or was subject to an adverse employment decision that was made solely because of his disability.

Courts have articulated that alcoholism and perceived alcoholism are only "disabilities" within the meaning of the statute if there is proof of a substantial limitation as to a major life activity, or a perception of such limitation, as evidenced by the following cases cited. *See, Bilodeau v. Mega Indus-*

Roush v. Weastec, Inc., 96 F.3d 840, 843 (6th Cir. 1996).

In order to be considered "disabled" as defined under the ADA, the Plaintiff must suffer from one of the following:

> 1. A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> 2. A record of such impairment; or
>
> 3. Being regarded as having such an impairment.

42 U.S.C. '12102(2). This determination comports with the applicable EEOC regulations, which state in relevant part:

There are three ways in which an individual may satisfy the definition of "being regarded as having a disability":

> (1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity *as constituting a substantially limiting impairment*;
> (2) The individual may have an impairment which is only *substantially limiting* because of the attitudes of others toward the impairment; or
> (3) The individual may have no impairment at all but is regarded by the employer as having a substantially limiting impairment.

See, 29 C.F.R. '1630, App.B '1630.2(l). (Emphasis added).

tries, 50 F.Supp.2d 27, 38 (D. Me. 1999) (1st Cir.) (In the context of perceived alcoholism, ATo prevail under [29 C.F.R. 1630.3(1)(C)] Plaintiff must show that Defendant perceived her as disabled in the sense that she had an impairment that substantially limited a major life activity."); *Pace v. Paris Maintenance Company, et al.*, 107 F. Supp.2d 251 (S.D. N.Y. 2000) (2nd Cir.) (AAlcoholism is not a *per se* disability under the ADA..... "Pace must demonstrate that he was regarded as having an impairment [alcoholism] that substantially limited a major life activity.") and ("Thus, the comment must be construed as evidence that [employer] thought Pace had a drinking problem. Still, this evidence is not sufficient to demonstrate that [employer] perceived Pace's impairment to be substantially limiting." *Pace, supra*, at 261). *See also, Francis v. City of Meriden*, 129 F.3d 281, 284 (2nd Cir. 1997) ("To be considered disabled under the "regarded as" prong of the statutes, therefore, a plaintiff must allege that the employer regarded the employee to be suffering from an impairment within the meaning of the statutes, not just that the employer believed the employee to be somehow disabled."); *Kelly v. Drexel Univ.*, 94 F.3d 102, 109 (3rd Cir. 1996)("[W]e hold that the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse employment action."); *Forrisi v. Bowen*, 794 F.2d 931, 935 (4th Cir. 1986) ("The record demonstrates that the employer's perception accorded with these facts. Far from being regarded as having a "substantial limitation" in employability, Forrisi was seen as unsuited for one position in one plant--and nothing more."); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 316-17 (5th Cir. 1997) (Holding that alcoholism is not a *per se* disability

under the ADA and evidence that alcoholics, in general, are impaired is inadequate to show the substantial limitation of one or more major life activities), *cert. denied*, 522 U.S. 1084, 139 L. Ed. 2d 768, 118 S. Ct. 871 (1998); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 885 (6th Cir. 1996) ("Under that provision [29 C.F.R. '1630, App.B '1630.2(l)], a plaintiff must show that the perceived impairment is a substantial limitation on a major life activity."). *See also, Byrne v. Board of Education*, 979 F.2d 560, 567 (7th Cir. 1992); *Wallin v. Minnesota Dep't of Corrections*, 153 F.3d 681, 686 n.4 (8th Cir. 1998) (*citing, Burch, supra.* and requiring that a plaintiff show impairment of a major life activity), cert. denied, 526 U.S. 1004, 119 S. Ct. 1141, 143 L. Ed. 2d 209 (1999); *Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 608 (10th Cir. 1998) ("[I]n passing the ADA, Congress intended to protect individuals from employment discrimination by employers on the basis of an actual or perceived disability, provided that the disability substantially limits or is perceived to limit substantially a major life activity."); *Wilson v. Int'l Bhd. of Teamsters, Chauffeurs and Warehousemen, et al.*, 47 F.Supp.2d 8 (D.C. D.C. 1999) ("Alcoholism is not, however, a per se disability.... 'Wilson's burden is thus to demonstrate that [the employer] regarded him as being substantially limited in a major life activity.' " *citing*, 29 C.F.R. 1630.2(j)(3); *Witter v. Delta Air Lines, Inc.*, 138 F.3d 1366, 1369 (11th Cir. 1998). *See also, Deas v. River West, L.P.*, 152 F.3d 471, 482 (5th Cir. 1998) (finding no evidence from which a reasonable jury could infer that the employer regarded Deas as substantially limited in her ability to work).

B. Petitioner Martin's reliance upon the Eighth Circuit decision in *Miners v. Cargill Communications, Inc.*, is misplaced and in fact contradicts his own arguments.

Petitioner Martin cites to *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir. 1997), for two propositions:

1. Alcoholism is considered a "disability" under the ADA (Pet.p.22); and
2. An employer's use of employee misconduct as a "misconduct exception" creates an unrebuttable non-discriminatory explanation, which is too difficult for a plaintiff to overcome. (Pet.p.25).

It is interesting that Martin should cite to Miners as support when in fact *Miners v. Cargill Communications, Inc.* is factually dissimilar to Martin's case, ultimately illustrates the fatal weaknesses in Martin's proof, and actually disproves Martin's own arguments with respect to an employer's use of the "misconduct exception."[2]

1. Petitioner's cite to *Miners v. Cargill Communications, Inc.*, is not appropriate.

Petitioner's cite to *Miners, supra.*, is inappropriate because the Eighth Circuit Court did not address the main issue raised herein, *i.e.*, whether or not an employee must prove their employer perceived them to be substantially limited in

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[2] As stated above, Petitioner Martin wholly failed to address the misconduct arguments set forth by Respondent Barnesville - IN EITHER COURT BELOW. This Court should properly deny Martin's Petition for a Writ of Certiorari on this ground.

any major life activities, rather than simply being perceived as being an alcoholic. As the U.S. District Court for the S.D. Ohio correctly concluded below (and as echoed by the string cite of cases shown above), it is not enough to show perceived alcoholism. A plaintiff must also show that they are perceived as being substantially limited. *Miners* does not address this, and as such is not an appropriate citation for this inquiry.

Additionally, *Miners* is factually dissimilar to the present case. In Miners, the plaintiff was a management employee of the defendant company. On one occasion the plaintiff informed her supervisor that she was late to work because she had been out late drinking the evening prior. The supervisor claimed to have been concerned over plaintiff's drinking and possible driving of a company vehicle, while intoxicated. The supervisor hired an investigator to follow the plaintiff after work. The investigator followed the plaintiff while driving her company vehicle to a local bar. Later that evening, the investigator observed the plaintiff exiting the bar. The investigator stopped her, identified himself as working for her employer, and took her keys. The investigator then drove off with the vehicle. The plaintiff was subsequently terminated for violating the company's policy of driving company vehicles, while intoxicated.

The plaintiff's employer explained that plaintiff was fired for her misconduct, (*i.e.,* driving a company vehicle while intoxicated). The *Miners* court concluded that plaintiff's presentation of evidence sufficiently rebutted the employer explanation for her termination by showing that: (1) the company knew of other managers who drove company vehi-

cles while intoxicated - and did not fire those employees; (2) the company did not actually inquire or investigate into whether or not plaintiff had actually been drinking alcohol at the bar; and (3) the company did not in fact have a written policy speaking to this issue.

Obviously, the plaintiff in *Miners* set forth more probative evidence, than did Martin in the instant case. Further, Miners' proof spoke specifically to a possible pretext by her employer, including different treatment for other employers. Martin offered no such probative evidence tending to disprove the basis for Barnesville's decision or its motivations.

As can be gleaned from the above analysis, Martin's cite to *Miners* only serves to illustrate the weakness (or absence) of his proof in the face of other abundant independent evidence that supports Barnesville's decisions and its motivations. *Reeves, supra.*, 120 S.Ct. at 2108.

2. Petitioner Martin's arguments with respect to the "misconduct exception" do not present a circuit conflict or need for clarification by this Court. The decisions of the lower courts were entirely proper and do not warrant review or clarification by this Court.

With respect to Martin's argument that an employer might utilize the "misconduct exception" as it is being referred to, to implement discrimination against persons wrongly perceived as being alcoholics and that any such showing of misconduct by the employee would presumably insulate them

from liability, *Miners* clearly holds to the contrary.[3] The *Miners* case clearly illustrates how such explanation is properly rebutted by a plaintiff, so as to overcome summary judgment.

A misconduct explanation, like all other explanations put forth by an employer, is subject to rebuttal by the plaintiff. If in fact an employer produces a misconduct explanation, both the misconduct and the explanation can be proven or disproved. This was precisely the case in *Miners*. The *Miners* plaintiff produced evidence that she had not broken a written company policy (because it did not exist); was treated differently from other managers; and HAD NOT EVEN BEEN PROPERLY INVESTIGATED TO DETERMINE IF SHE HAD ACTUALLY ENGAGED IN THE CLAIMED MISCONDUCT.

Query as to whether or not misconduct is a more difficult explanation to overcome when the plaintiff did, in fact engage in the misconduct for which he was accused and possi-

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[3] It is also worth noting that Martin makes this self serving argument, *i.e.,* that an employer's use of an employee's own misconduct would be an unrebuttable, non-discriminatory explanation and that it would be too difficult to disprove or overcome in the burden shifting analysis - is ironic at best, considering that it is an employee's own misconduct that is at issue. It is ironic that Martin seeks protection from employers' actions, ... the same employers who must ultimately be responsible for employee misconduct occurring in the course and scope of their duties.

bly fired? Perhaps so, but what is an employee doing, if not jeopardizing his job, when he knowingly undertakes misconduct? What consequences does he expect, when violating company policies? What does an employee expect when he brings alcohol to his job at an elementary school, opens and drinks it, and then runs, hides and lies about it when discovered? These are the legitimate and non-discriminatory reasons for disciplining an employee in the first place. Should that change merely because an employee's misconduct may involve his or her own use of alcohol? The answer is quite clearly no. The reason for this is simple, an employee must properly prove his or her prima facie case to be protected by the ADA. Most relevant to this inquiry, is the element of perceived substantial limitation as to a major life activity. Without this showing, an employee's own misconduct is just that - and being disciplined for the same is not discrimination.

Nevertheless, when rebutting a misconduct explanation, it is simply incumbent upon the employee to prove that either he did not engage in the alleged misconduct, he was disciplined differently than others or for some reason other than merely the misconduct, that the employer's explanation is false in fact or in motive, and/or that the misconduct does not relate to the employer's ultimate actions with respect to the employee. This is not a new or different standard. As actually proven in *Miners*, a misconduct explanation is not "unrebuttable" and there is no conflict or need for further clarification than that set forth in *Reeves v. Sanderson., supra.*

Furthermore, the above analysis may or may not involve an "impairment" or "disability" and may or may not involve the impairment of alcoholism. Misconduct of many kinds (which may or may not stem from an impairment or disability) would find an employee in trouble and subject to employer action. If it was not significant misconduct or was not proven misconduct, then a plaintiff can more easily rebut the allegations as a pretext. If misconduct is proven, shown to be serious, in violation of policies, and with implications of safety and security, then a plaintiff will need to prove with relevant probative evidence why the proffer of a misconduct explanation (and or the employer's motivation or intent) is false or a pretext for something else. This is not more difficult because of a heightened standard of proof, but because such actions usually warrant employer intervention for purposes of preventing their own liability, if nothing else.

In the instant case, the Sixth Circuit correctly concluded that:

> The ADA does not protect a plaintiff from his own bad judgment. The plaintiff cannot force defendant to hire him as a school bus driver when there is a serious risk that he may again drink on the job, have an accident and kill a group of school children. Any suggestion to the contrary is absurd. ... Therefore, even if we assume that plaintiff has established a prima facie case of discrimination, defendant has articulated a legitimate, non-discriminatory reason for its actions. Plaintiff has not demonstrated that this stated reason is a pretext for any unlawful discrimination.

(See Court of Appeals Opinion, contained in Petitioner's Appendix at page 8a). The Court below properly considered that Martin must produce, and in fact failed to produce, evidence of pretext upon which reasonable minds could find in his favor.

CONCLUSION

For reasons that: Petitioner fails to raise issues of significant conflict or confusion among the circuits; failed to raise several issues in either court below; failed to understand and apply this Court's decision in *Reeves, supra*; failed to make even a prima facie or baseline showing of perceived disability, and because there is no conflict with respect to a court's inquiry when faced with a claim for perceived alcoholism, this Court should not grant Petitioner's request for a Writ of Certiorari as to the issues raised.

Respectfully submitted,

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APPENDIX A – DEPOSITION OF BARNESVILLE EXEMPTED VILLAGE SCHOOL DISTRICT BOE, BOARD PRESIDENT ROBERT MILLER (EXCERPTS)

Deposition of Robert Miller (excerpts)

By Mr. Lillard:

Q. Now, it has on the first page paragraph titled No. 1, it says, "Employee Dennis Martin admits that he has a problem with consumption of alcohol; he has a 'drinking problem.'" Do you know who drafted that terminology?

A. Well basically the reason that sentence was in there was Denny Martin had denied that he ever drank that beer. It was my word against Denny's. The board knew that. Chester [Kenny] had not been a witness to it. There had only been two people there. My integrity was on the line. Mr. Atkinson, I believe, still was on the board at the time, as well as part of the settlement wanted to know the truth. As part of the settlement, he requested through their attorneys that Mr. Martin admit that he was drinking that night. And he did so. That's why the sentence was there. It's an admission that "Yes,

Appendix A

Rob [Miller] was not lying that night. He did catch me drinking."

(R.13 Miller deposition, p.36).

By Mr. Lillard

Q. Okay. So what was the intent of that statement?

A That was the gist of the statement, that he was drinking that night and has made a mistake in drinking.

(R.13 Miller deposition, p.37).

There is additional evidence that Barnesville (through its board members and employees) did not consider the LCA a finding of "alcoholism." Again, Robert Miller explained:

Q. All right. Now, it [the settlement agreement] indicates in order for him [Martin] to keep his job, he is required to go through a 28-day alcohol rehabilitation program, does it not?

A. Yes.

Q. And that's a pretty significant program is it not?

Mr. Albert: Objection. Go ahead.

Appendix A

A. **Well, our reasoning was this: That we don't have the expertise to determine whether Mr. Martin has a problem, does not have a problem; whether it was just a one time shot and he screwed up. The board's position was that he made a mistake. If the detox program, who has trained people, was able to help him if he did have a problem it would correct that situation. I[f] he didn't have a problem, then he'd come out a better person. But it was our- We insisted that he had to attend this detox program for their determination. Not only to help himself, but because we are not -do not have the expertise to determine whether he does have a drinking problem or does not have a drinking problem.**

Q. So you didn't know whether it was a one time incident, the first time he's ever done it or-

A. It's the only time I ever observed him drinking.

Q. - or whether he was a chronic alcoholic?

Appendix A

A. I had no knowledge.

(R. 13 Miller deposition, p.38). (Emphasis added).

APPENDIX B – 28 C.F.R. 41.31(b)(4)(iii)

TITLE 28 – JUDICIAL ADMINISTRATION

CHAPTER I – DEPARTMENT OF JUSTICE

PART 41– IMPLEMENTATION OF EXECUTIVE ORDER 12250, NONDISCRIMINATION OF THE BASIS OF HANDICAP IN FEDERALLY ASSISTED PROGRAMS - Table of Contents

Subpart B – Standards for Determining Who are Handicapped Persons

Sec. 41.31 Handicapped person.

(a) Handicapped person means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

(b) As used in paragraph (a) of this section, the phrase:

(1) Physical or mental impairment means:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardio

vascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) Major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) Has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) Is regarded as having an impairment means:

Appendix B

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (b) (1) of this section but is treated by a recipient as having such an impairment.

APPENDIX C – 29 C.F.R. § 1630(1)(3)

TITLE 29 – LABOR COMMISSION

PART 1630 – REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT - Table of Contents

Sec. 1630.2 Definitions. (In relevant part)

(l)Is regarded as having such an impairment means;

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.